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No. 98-525

In the
Supreme Court of the United States
OCTOBER TERM, 1998

OPERATION RESCUE NATIONAL, PHILIP F. LAWLER, RANDALL TERRY DBA OPERATION RESCUE AND ROBERT D. JEWITT DBA OPERATION RESCUE,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeal for the First Circuit

REPLY TO BRIEF IN OPPOSITION

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SUMMARY OF ARGUMENT

In its Brief in Opposition, the United States demonstrates why this Court should grant the Petition. Answering the question whether Members of Congress are officers of the United States[1], heretofore a distinguishing feature central to the American form of government, will provide the necessary statutory guidance in interpreting the Federal Tort Claims Act, as amended by the Westfall Act, as well as providing similar guidance respecting numerous other federal statutes wherein are found the phrases, "Members, officers, employees" and

1. The United States Attorney had certified that Senator Edward M. Kennedy "was acting within the scope of his employment as an officer and employee of the United States." Pet. at 4.

"officers, employees."

REPLY ARGUMENT

1.a. In its opposition, tracking the decisions below, the United States confuses Members of Congress with officers of the United States generally, or with the officers and employees of the legislative branch specifically. As Petitioners have amply documented, Congress has always expressed itself unequivocally -- with positive statements -- when it intends for its Members to be included within a particular statute's provisions. In this case, such an expression is not found in the Westfall Act or its legislative history[2]. If Congress means to

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2. The United States suggests, Brief in Opposition at 10-11, that Congress could have "rationally conclude[d]" that its Members required broader immunity to be "effective legislators." This conjecture ignores entirely the Speech or Debate Clause. Petitioners had argued that the Speech or Debate Clause has given Members the full spectrum of legislative immunity enabling Members to be fully "effective legislators." This Clause has provided perfect and comprehensive immunity to Members for more than two centuries without any complaint of inadequacy respecting the "ability to legislate." Brief in Opposition at 10.

Further, the United States misunderstands, Brief in Opposition at 9, the strength of the Speech or Debate Clause. This Clause enables Members to execute the legislative process -- the sole, constitutionally-designated function of Members -- without fear of recrimination. Thus, Members have never been "unduly chilled," Brief in Opposition at 9, in carrying out any aspect of their constitutional function.

Statutory interpretation, where required, discovers what

include its Members within the Westfall Act, then Congress, not the courts, is the entity to make this express declaration.

The generally accepted legal postulates of statutory interpretation include the precept that the specific use of a term is preferred over any general use that might otherwise be ascribed to the term. *Cf. Gustafson v. Alloyd Co.*, 513 U.S. 561, 574-75, (1995). This Court has held, for example, that the word "officer" means "any appointee exercising significant authority pursuant to the laws of the United States," *Buckley v. Valeo*, 424 U.S. 1, 126 (1976), *Weiss v. United States*, 510 U.S. 163, 170 (1993), and who has been "appointed in the manner prescribed by § 2, cl. 2, of [] Article [II]." *Buckley*, at 126. And consistent

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Congress has done not what courts speculate. To proceed otherwise with that delicate function is to "profoundly mistake[]" the role of the judiciary. *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 100-01 (1991); see also *id.* at 98-101.

Moreover, if Congress rationally concluded, as the United States suggests, that its Members needed greater immunity, neither the Westfall Act nor its legislative history contains any indication thereof. Indeed, in the legislative history underlying the Westfall Act, not one word is found in support of the position taken by the United States that Congress perceived, needed, or wanted greater immunity for Members. Oddly, Congress' failure to include the word "Members" represents the sole and peculiar evidence offered by the United States to support its claim that Members were to be considered officers within the meaning of this statute. "Inaction, we have repeatedly stated, is a notoriously poor indicator of congressional intent, see, e.g., *Bob Jones University v. United States*, 461 U.S. 574, 600 (1983); *Zuber v. Allen*, 396 U.S. 168, 185-86, n. 21 (1969)." *Schweiker v. Chilicky*, 487 U.S. 412, 440 (1988) (Brennan, J., dissenting).

with this understanding, Congress itself has, through its historical practice, excluded its Members from the scope of the term "officers" as used in federal statutes, except through express statement.

Petitioners demonstrated in the courts below that Members of Congress are elected, U.S. Const. Art. I, §§ 2, 3, amend. XVII[3], not appointed, and that they exercise their constitutionally-conferred legislative authority, pursuant not to "the laws of the United States," but rather pursuant to authority flowing directly to them from the people themselves. U.S. Const. Art. I, § 1. "Law[s]" of the United States, U.S. Const. Art. 1, § 7, result only when Congress and its Members exercise its and their respective constitutionally-conferred authority. U.S. Const. Art. I, §§ 1, 7. Cf. *Clinton v. City of New York*, 118 S. Ct. 2091, 2103-04 (1998).

Unlike officers, who are directly accountable to and answerable to Congress through the impeachment process[4], Members of Congress are only accountable to the direct source of their authority, the people themselves.

The United States, Brief in Opposition at 8-9, insists that

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3. Representatives in Congress are endowed with the "representative trust," The Federalist No. 57, at 351 (James Madison) (Clinton Rossiter ed. 1961) Senators in Congress are endowed with the "senatorial trust." The Federalist No. 62, at 376 (James Madison) (Clinton Rossiter ed. 1961).

4. All civil officers of the United States are subject to impeachment and removal, the power of which lies solely in the United States Congress.

one common dictionary definition of "officer" controls the statutory construction of the Westfall Act, notwithstanding (1) the historical definition and understanding of the term "officer" as used by Congress when drafting federal statutes, (2) the consistent use by Congress of the specific word "Members" to accomplish the inclusion of its Members within a particular statute, (3) the well-established practice of Congress to state expressly when its Members are to be embraced within the confines of a particular statute, and (iv) this Court's understanding of the statutory term "officer." The United States presumes, and would have this Court believe, that when Congress enacted the Westfall Act, it wrote upon a blank slate using generic terms divorced from historic and well-established usages.

In its footnote 2, the United States cuts arguments from whole cloth. The legislative immunity referenced in Title 28 U.S.C. § 2674 has no bearing on Members for a simple reason. Members are already possessed with full legislative immunity by virtue of the Speech or Debate Clause. Therefore, the intended beneficiaries of § 2674 are those to whom a derivative benefit may flow from the Speech or Debate Clause's immunity, namely, legislative officers and employees. See, e.g., *Gravel v. United States*, 408 U.S. 606 (1972).

As to the "acting on behalf of" language found in Title 28 U.S.C. § 2671, the argument of the United States also fails. Individual Members do not act on behalf of the legislative branch. Rather, Members act on behalf of the people. The Congress of the United States is "a body composed of representatives of the people." *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 821 (1995). Further, this language has been held only "to cover special situations" such as the

"dollar-a-year man" or employees of another placed under the direct supervision of a federal agency. *Logue v. United States*, 412 U.S. 521, 531 (1973). Neither situation applies to a Member of Congress.

1.b. Reliance by the United States on *Lamar v. United States*, 241 U.S. 103 (1916), is misplaced. Lamar dealt with a criminal statute, not a civil statute such as the Federal Tort Claims Act or the Westfall Act. Further, Lamar assessed the criminal conduct of a third party; the conduct of a Member of Congress was not the focus of that case. The statute in Lamar, unlike the statute at issue here, did not attempt to alter the constitutionally established relationship of Members of Congress with the people themselves. And, finally, Lamar preceded this Court's decisions in *Myers v. United States*, 272 U.S. 52 (1926), *Buckley v. Valeo*, 424 U.S. 1 (1976), and, *Bowsher v. Synar*, 478 U.S. 714 (1986).

Respondent's invocation of *Williams v. United States*, 71 F.3d 502 (5th Cir. 1995), and cases under Title 28 U.S.C. § 1442 (holding a Member of Congress to be an "officer of the United States"), is unavailing. These holdings fly in the face of Congress' own well-established and well-documented practices. These cases contain no discussion of the arguments presented herein by Petitioners, notably the bright line established between Members of Congress and officers of the United States.

2. The constitutional exegesis by the United States is unsound and incorrect. The United States maintains, Brief in Opposition at 12, that unless the Constitution contains an express prohibition on Congress' ability to expand its Members' immunity beyond that conferred by the Speech or Debate Clause, Congress is necessarily possessed with such authority.

The United States ignores first principles. The Constitution of the United States does not endow the federal government with the universe of powers, excepting only those powers expressly reserved or prohibited. To the contrary, the federal government has been delegated only those powers, "few and defined," The Federalist No. 45 , at 292 (James Madison) (Clinton Rossiter ed. 1961), textually and specifically granted. Cf. U.S. Const. amend. X. Petitioners should not have been required in the courts below to show a restraint upon Congress' powers; rather, it was the unmet burden of the United States to show that Congress possesses, by express delegation, the claimed federal power. Cf. *City of Boerne v. Flores*, 117 S. Ct. 2157, 2168 (1997).

The express delegations in the Constitution of powers "few and defined" do not include any power by which Congress could enlarge the immunity of its Members. Thus, it is this absence of an express delegation that operates as a constitutional limitation on the power of Congress to so enshroud itself. Cf. *Clinton v. City of New York*, 118 S. Ct. 2091, 2103 (1998).

The Necessary and Proper Clause is not a stand-alone independent grant of federal power. The United States has not answered Petitioners' argument that the Necessary and Proper Clause is a derivative, secondary power that can only be used in conjunction with a primary power. Hamilton expressed precisely this understanding in The Federalist No. 33.

The United States invokes a series of cases, *Butz v. Economou*, 438 U.S. 478 (1978), *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), and *Clinton v. Jones*, 117 S.Ct. 1636 (1997), in a unsuccessful bid to place persons who are undoubtedly officers of the federal government (the Secretary of Agriculture and the

President) on par with Members of Congress. Respondent's invocation of these cases evinces its failure to recognize the organic distinction between Members of Congress and officers of the United States. Congress could, of course, as these cases hold, grant greater immunity to such officers of the United States who are creatures of statute.

A quite different situation is found for Members, however, who are not statutory creatures. Members represent the people themselves and are called to serve by the direct action of election. Only the people, by means of a constitutional amendment, can alter the terms upon which Members are engaged to represent them. One salient example of such action by the people is the Seventeenth Amendment, by which amendment the method of electing Senators was altered to require direct election by the people. See also *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-33 (1995).

Petitioners have argued that Members were not given the constitutional authority to enlarge their own immunity in order to encourage in Members "an habitual recollection of their dependence on the people." The Federalist No. 57, at 352 (James Madison) (Clinton Rossiter ed. 1961). That Members are without authority to alter by mere statute the constitutionally established relationship between Members of Congress and the people of the United States is recognition that Members are inherently and fundamentally different than officers of the United States, and that they, Members, unlike officers, are accountable directly to the people of the United States. To hold otherwise would conclude that Congress might "define its own powers by altering the [Constitution's] meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.' It would be 'on a level with

ordinary legislative acts, and, like other acts, ... alterable when the legislature shall please to alter it.' *Marbury v. Madison*, 1 Cranch, at 177, 2 L.Ed. 60." *City of Boerne v. Flores*, 117 S. Ct. 2157, 2169 (1997).

CONCLUSION

The Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit should be granted and the case set for plenary review.

Respectfully submitted,

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